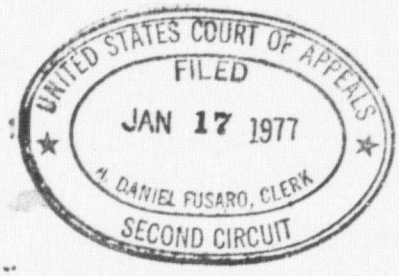
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

1-17-77



76-7522

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARGARET TOWNSEND,

Plaintiff-Appellee,

-against-

NASSAU COUNTY MEDICAL CENTER, Dr. Donald H. Eisenberg, Superintendent, NASSAU COUNTY CIVIL SERVICE COMMISSION, Gabriel Kohn, Chairman; Edward S. Witanowski, Edward A. Simmons, Adele Leonard, Executive Director of Nassau County Civil Service Commission; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; Esra H. Posten, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

B P/s

BRIEF FOR PLAINTIFF-APPELLEE

SUSAN KLUEWER
Community Legal
Assistance Corporation
McEVILY & KLUEWER
Attorneys for Plaintiff-
Appellee
73 Main Street
Hempstead, New York 11550
(516) 489-4226/7

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STATEMENT OF THE CASE

Plaintiff-appellee (hereinafter plaintiff) brought suit against the named defendants alleging inter alia a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §200(e) et seq. in that the plaintiff had been terminated from her position as a Provisional Medical Technologist I at the Nassau County Medical Center (hereinafter NCMC) and subsequently demoted to the position of Provisional Laboratory Technician II at the NCMC because she did not possess a college degree, an eligibility requirement that was imposed some years after she began her employment. The action was dismissed as to the state defendants and a motion for a preliminary injunction was subsequently denied. The case went to trial before the Court (Hon. Jack B. Weinstein) without a jury on September 22-24, 1975. The Court by a memorandum and order dated December 8, 1975, granted to the

plaintiff against the County defendants the permanent relief requested in the complaint. Final judgment was entered in the case by the Court on February 27, 1976.

The County defendants (hereinafter defendants) subsequently appealed. This Court remanded the case to the District Court for reconsideration in light of Washington v. Davis, ___U.S.___, 96 Sup. Ct. 2040, 44 U.S.L.W. 4789 (1976), particularly Part III thereof.

Following submission of briefs and oral argument, the District Court (Hon. Jack B. Weinstein) rendered judgment dated September 27, 1976, confirming the original judgment. Defendants now seek review of both judgments.

There are several inaccuracies and inadequacies in defendant's Statement of Facts. Defendants stated (at p. 3 of their briefs) that plaintiff "was permitted to take the competitive examination for the position of Medical Technologist I which was given on

December 4, 1971 (A 80). Had[plaintiff]passed this examination, she would have been accorded permanent status as a Medical Technologist I, as was Mr. Allen Scimeca (A 161-162) regardless of whether she possessed any formal degrees or certification (A 168). However, [plaintiff]failed the examination and now seeks to be reinstated as a provisional Medical Technologist I."

It is not failure of the 1971 exam which is at issue in this case. Plaintiff was discharged in 1973 from her position as a Medical Technologist I solely because she did not possess a Bachelor's Degree or ASCP Certification (A399, A 344) and was thus determined by defendants to be ineligible to take the examination given in 1973.

It is important to note that defendants gave "grandfather" rights to plaintiff for only one examination (A 424-425) and that plaintiff, like Mr. Scimeca, had RMT

Certification (A 269). In addition, in order to obtain ASCP certification, it is necessary to have a Bachelor's Degree (A 102). Had plaintiff possessed a Bachelor's degree, she, like George Appelwaite, would have been continued in her provisional position, notwithstanding her failure of the 1971 exam, and would have been afforded the opportunity to take the exam in the future.

Defendants indicated (in their brief at page 3) that "It appears that all persons in the blood bank, except for supervisors and assistant supervisor, perform the same duties." While it is true that there is "no meaningful specialization of labor within the blood bank" (A 294), the more accurate statement is that an employee does what he is trained to do, regardless of title. (See A151). Thus, plaintiff performs substantially the same duties as a Lab. Tech. II that she performed

as a Med. Tech. I (A99, A113, A133); she does so without the supervision normally required for a Lab. Tech. II. (A141, A142). In addition she performs duties which other Med. Tech.'s I's are not qualified to perform (A139).

Defendants stated (on p. 4 of its brief) that plaintiff was discharged on December 31, 1973, with three other provisional Medical Technologists I, all of whom were white. There is no evidence in the record to substantiate that statement and plaintiff submits that it is not a true statement.

Defendants' insistence that the Med. Tech. I specification and position (Appellant's brief, p. 4) is utilized in all laboratory jobs is misleading inasmuch as all evidence showed that all laboratory personnel at NCMC work in only one laboratory.

The Court held that the requirements for the position at issue had a racially dispro-

portionate impact on all blacks, and ruled that, as to plaintiff, defendants had not sustained their burden of demonstrating the job-relatedness of those requirements. The court specifically declined to rule on the validity of the educational requirements as applied to new applicants, and left that questions for exploration in future litigation. (A305).

POINT I

PLAINTIFF PRESENTED A BONAFIDE TITLE VII, AND HENCE FEDERAL QUESTION.

By setting forth the argument that plaintiff has presented no substantial federal question, defendants apparently assert that "internal administration of a civil service matter " shields them from compliance with Title VII even when such administration violates Title VII. This argument was not advanced in the court below and is raised here, not as a defense to plaintiff's showing of discriminatory impact, but rather as a

bar to consideration of plaintiff's claims altogether. Plaintiff feels constrained to follow the structure of defendant's brief and will focus her argument, and cite cases, in the order in which issues are raised by defendants.

(a) Title VII analysis was properly applied to the case at bar.

Proof in employment discrimination cases goes from effect to cause. Kirkland v. New York State Department of Correctional Services, 530 F. 2d 420 at 425 (2d Cir., 1975). The effect proved in this case is that defendants requirement of a college degree as a pre-requisite for the taking of a civil service examination for the position of Medical Technologist I operates to disqualify blacks from employment disproportionately more than whites.

More specifically, the proven effect was that plaintiff, a black woman, was frozen out of a job about which there is no dispute that she is eminently qualified to perform and which she did perform for some six years before defendants terminated her solely because she, like many blacks, did not possess a college degree. Once that effect is proven, defendants must justify the cause, i.e. the degree requirement, as being job related. Kirkland, supra; Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971); Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362 (1975); Washington v. Davis, ___U.S.___96 S. Ct. 2047 (1976); Rich v. Martin Marietta Corp., 522 F 2d 333 (10th Cir, 1975).

The Court below properly ruled that the cause of plaintiffs termination and subsequent demotion - a requirement which was shown to have a disproportionate racial

impact - had not been adequately justified or validated, and thus plaintiff was entitled to relief under Title VII.

Defendants contend that because the Court did not declare the job requirement at issue to be "discriminatory" as to all blacks, no federal question was presented. Such a contention ignores the step-by-step analysis applied in Title VII cases: First, a Title VII plaintiff must show the "racially disproportionate impact" of challenged requirement;[1] second, once that impact is shown, the Court must then determine whether defendants

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[1] The First Circuit, see e.g. Boston Chapter NAACP, Inc. v. Beecher, 504 F 2d 1017 (1st Cir, 1974) and this Court, use the phrase "racially disproportionate impact" because the "phrase seems preferable to 'discrimination' or even 'de facto discrimination' since these terms have acquired a pejorative cannotation not warranted in the initial phase of the inquiry. Vulcan Society of the New York Fire Department v. Civil Service Commission, 490 F 2d 387 at 391 (2d Cir, 1973).

have met their burden of showing a "manifest relationship" to the job. Griggs, supra. If that burden is not met, the Court must then determine what relief is appropriate. See e.g. Boston Chapter NAACP, Inc. v. Beecher, 504 F 2d 1017 (1st Cir, 1974); Bridgeport Guardians, Inc., v. Bridgeport Civil Service Commission, 482 F 2d 1333 (2d Cir, 1973); Vulcan Society of New York Fire Department v. Civil Service Commission, 490 F 2d 387 (2d Cir, 1973). Thus a finding of racially disproportionate impact "does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume." Vulcan Society, supra at 393.

The Court below properly went through the step-by-step analysis, finding, first, a racially disproportionate impact; second, failure of the defendants to prove validation as to plaintiff; and only then finally de'er-

mining what relief was appropriate. That the Court declined to rule on the validity of the degree requirement "except in the special circumstances of the case before it"(A304) in no way renders the application of Title VII principles clearly erroneous.

It is interesting that defendants cite McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) in support of their contention that the court below erred in applying Title VII to the case at bar.

There, the Court required the plaintiff, who, like plaintiff here was suing individually, to prove (1) that he belongs to a minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) after his rejection the position remained open and the employer continued to seek applicants from persons of

complainants qualifications.

Plaintiff here has met the McDonnell burden by showing: (1) that she is black(A64); (2) that she was qualified for and competently performed the job, a fact which is not disputed (165, 142); (3) that in spite of her competence she was terminated from her job because she did not possess a college degree (A339, A344); (4) that the cause of her termination was an employment practice which had a racially disproportionate impact on blacks (A360-A370); and (5) that after her termination she was asked by appellants to return to work, but at a lower-grade job title, even though she performed substantially the same duties as before (187, 140). The slight variations in what the plaintiff was required to prove in McDonnell Douglas Corp. v. Green, and what plaintiff here did prove,

is warranted by the differing factual situations.[2]

Defendants attempt to distinguish the case at bar from Berger v. Board of Psychologists Examiners, 521 F 2d 1056 (DC Cir, 1975). However, the cases are clearly analogous, and the Court treated them simply as such. Appellee had been a blood bank specialist for 12 years and had been in the Nassau County Medical Center for over 10 years. Although she was "grandfathered" in and permitted one attempt at taking a test, despite the fact that she did not have a college degree, the "grandfathering" treatment was terminated thereafter, and she was not permitted to take

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[2] The McDonnell Court noted that "The facts necessarily will vary in Title VII cases and the specification...of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." Supra, at 802, fn. 13. See Part II at p. 33 infra.

additional examinations. The District Court in relying upon Berger, supra, stated "[I]f the right of a current, qualified practitioner to maintain his or her employment cannot be extinguished by statute, it follows a fortiori that such a result may not be accomplished by regulations which conflict with statutory policies against racial discrimination."(A307).

Defendants have also contended that a minority person's competence and ability to perform the job admirably can form no part of Title VII case analysis. Quite the contrary is true:

> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract. Griggs v. Duke Power Co., supra at 436, 91 S. Ct. at 856 (emphasis added).

(b) The Court acted properly in protecting plaintiff's rights in accordance with the United States Constitution.

In order to effectuate the purposes of Title VII, clearly applicable to this case, a federal court may override state Civil Service Law. United States Constitution, Article VI Cl.2. Defendants have put forth no tenable arguments, or cited any cogent case law which supports their arguments that the Civil Service Law prevents the Court from applying Title VII to the instant case.

Defendants contend that reinstatement of plaintiff as a Medical Technologist I was an abuse of discretion that encroached upon local sovereignty. In Title VII cases, Federal courts are clearly empowered to fashion the remedy that is appropriate to the circumstances of a given case. 42 U.S.C. 2000e-5(g). National League of Cities v. Usery, ___U.S.___, 96 S. Ct. 2465 (1976), and

Bishop v. Woods, _____U.S. _____, 96 S. Ct. 2074 (1976) are inapposite. Bishop v. Woods held that whether employment status is a property interest protected by the Due Process Clause of the Fourteenth Amendment was a question that must be decided by looking to state law. There was no confrontation in that case between state or local law and overriding constitutional or Title VII principles involved. In National League of Cities v. Usery, the Court, citing the Tenth Amendment, held that Congress may not exercise power in a fashion that impairs State integrity in a Federal system. Here, there is no challenge to the congressional enactment of Title VII.

The issue to be determined is not, as defendants maintain (on p. 9 of their brief), whether plaintiff, by virtue of her provisional status, has a cognizable federal right to be retained as a Medical Technologist I, but whether she has been denied employment

opportunities because of race. Title VII standards were properly applied to determine that issue.

Russell v. Hodges, 470 F 2d 212 (2d Cir, 1972); Gallagher v. Codd, 407 F. Supp. 956 (SDNY), and Haron v. Board of Education of the City of New York, 411 F. Supp. 68 (EDNY 1976), cited by defendants, present situations not even analogous to the case at bar. Each of those cases presented claims of city workers who alleged deprivation of property rights in violation of the due process clause. No violation of Title VII rights was involved.

Matter of Wirzberger v. Watson, 305 NY 507 (1953), and Koso v. Greene, 260 NY 491 (1933) are equally unpersuasive and inappropriately cited. Neither involved employment discrimination, and both were decided well before the enactment of Title VII.

Defendants contend that because of this Court's holding in Kirkland v. New York State

Department of Correctional Services, 520 F 2d 420 (2d Cir, 1975), the instant case presents no federal or Title VII question. In Kirkland, employment discrimination principles were clearly applied, even though the challenge involved a civil service examination. Defendant's use of a quotation from Kirkland is misleading. The Court was discussing not the applicability of either Title VII or 42 U.S.C. §§ 1981 and 1983 to "civil service" disputes, but rather, the imposition of quotas as one form of relief. Clearly, in this case involving only one plaintiff, the language quoted by the appellants is irrelevant.

Finally, this and other courts have repeatedly recognized that employment practices which have a disproportionate impact, and which cannot be justified as job related, must give way to the overriding

remedial policies of Title VII even when those practices are promulgated pursuant to State Civil Service laws and regulations. See e.g. Acha v. Beame, 531 F 2d 648 (2d Cir, 1976); Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F 2d 1333 (2d Cir, 1973); Chance v. Board of Examiners, 458 F 2d 1167 (1st Cir, 1972).

(c) The decision of the Court below neither mandates nor effects reverse discrimination.

The concept of "reverse discrimination" in the context of equal employment litigation has almost uniformly been applied to class actions where the remedial imposition of quotas or other preferential treatment for minorities as a group has been ordered by the courts. See e.g. Acha v. Beame, supra; Equal Employment Opportunity Commission v. Local 638, 532 F 2d 821 (2d Cir, 1976); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, supra. And it

is only applied in the context of appropriateness of remedy once employment discrimination is shown.

The case at bar, however, is a private, non-class action suit where no quotas of any kind have been imposed. As a result of the finding of Title VII violation, plaintiff here was merely restored by Court order to her "rightful place", Pettway v. American Cast Iron Pipe Co., 494 F 2d 211 (5th Cir, 1974) a place she would have occupied but for an employment requirement that operated to exclude blacks disproportionately more than whites.

Defendants rely heavily on Milson v. Leonard, ___F. Supp.___, EDNY, Docket No. 74C 904 (1975, Dooling J) in making their assertion that reverse discrimination exists at NCMC solely by virtue of the lower Court's decision in plaintiff's favor. However, the two cases presented quite different legal

and factual situations, and the lower court here quite properly ruled only on the issues then before it.

Plaintiff in Milson did not challenge her demotion (she was not, like plaintiff here, terminated) on the basis of a Title VII claim of right, or any claim of right, that the Court could discern (Slip Opinion, at p. 4), and contrary to what defendants imply in their brief, the Court did find it had jurisdiction under 28 U.S.C. §1343.

It is important to note that plaintiff in Milson was permitted to take the examination appropriate for her provisional status twice, notwithstanding her failure to meet educational and training requirements (Slip Opinion at p. 3). Plaintiff here was given "grandfather" rights for only one exam. It is clear that it is Milson, to whom defendants point as a victim of the "reverse discrimination", who was given preferential

treatment, not by the courts, but by the defendants.

Assuming arguendo that the situation is as defendants claim, the solution is not to deny plaintiff here the relief to which she is so clearly entitled, but rather for defendants to voluntarily review their own employment practices, in light of Title VII legislation and case law.

Defendant's citation of McDonald v. Santa Fe Transportation Co., ____U.S. ____, 96 S. Ct. 2574 (1976) is inapposite. There, the Court held it improper for a federal court to refuse to apply Title VII to a case where Title VII issues were raised, solely because that plaintiff was white.

Neither is Kirkland v. New York Board of Correctional Services, supra, germaine to the issue here. The Court held that, when dealing with a small, identifiable group, it

was more appropriate to address individual rights rather than statistical classifications based on race.

Here, however, no quotas have been imposed. And plaintiff here is "bumping" no one from a preferred position.[3] There is no evidence in the record that anyone at NCMC, including plaintiff Milson, will lose status by virtue of the relief awarded here. Plaintiff's reinstatement to a Med. Tech. I position affects no one other than plaintiff, who, by virtue of the lower court order, is finally to be given the job title and pay to which her qualifications and outstanding job performance entitle her.

[3] In fact, defendants contended in Point I (a) of their brief (at p. 7) that the Court was creating "a special position at NCMC for this Appellee."

This result is entirely consistent with this Court's decision in Equal Employment Opportunity Commission v. Local 638, supra, in which the imposition of one quota, but not another, was approved.

The Court below, by the limited relief awarded, focused on an individual identifiable plaintiff who clearly demonstrated her qualifications for a job that she was improperly denied, Acha v. Beame, supra, and it did so without interfering with the rights or employment expectations of any other persons, black or white.

POINT II

THE COURT CORRECTLY FOUND THAT PLAINTIFF HAD PROVEN A PRIMA FACIE CASE UNDER TITLE VII.

Plaintiff has demonstrated by statistical evidence that the challenged college degree requirement operates in Nassau County to disqualify blacks from employment as Medical Technologists I at a rate more than

three times greater than whites. Appellants do not and cannot challenge the accuracy of these findings. Nor do they contend that the disparity in education shown between blacks and whites is too small to shift the burden.

Nowhere in fact do defendants contend that racially disproportionate impact was not demonstrated by plaintiff. Instead, defendants baldly contend that plaintiff failed to show that any actions on the part of supervisors at NCMC discriminated against her individually because of race, notwithstanding plaintiff's proof that defendants terminated her from a job she was eminently qualified to perform because of "factors which are the functional equivalent of race" Robinson v. Lorillard, 444 F. 2d 791 (7th Cir., 1971).

Instead, defendants assert that plaintiff's proof of her qualifications for and successful performance of the job are irrelevant to the inquiry (Point I (a) of defendant-

appellant's brief) and the unchallenged census statistics are insufficient to make out a prima facie case. But a prima facie "employment discrimination" case has been defined as plaintiff's burden of demonstrating the "racially disparate consequences", Kirkland v. New York State Department of Correctional Services, supra at 425, or "racially disproportionate impact", Vulcan Society of New York City Fire Department v. Civil Service Commission, supra, of the challenged requirement on a protected class, of which the plaintiff is a member. (See Spurlock v. United Airlines, 475 F. 2d 216 (10th Cir., 1972) where "discriminatory result" is used).

By the arguments made and cases cited, it becomes clear that defendants, without directly stating so, assert that plaintiff, because she is suing as an individual rather than as a class, is not protected and can be

afforded no relief under Title VII. But it is equally clear that "[T]here is no exception to the terms of the Act for isolated cases." McDonald v. Santa Fe Trail Transportation Co., supra at 2578.

Thus, defendants' attempt to distinguish United States v. Georgia Power Co., 474 F. 2d 906 (5th Cir., 1973) and Johnson v. Goodyear Tire and Rubber Co., 491 F. 2d 1361 (5th Cir., 1974) on the grounds that they were class actions involving large numbers of employees is misguided. The Court below properly relied on those portions of Johnson, supra, and United States v. Georgia Power Company, supra, that were relevant to the inquiry then before it. In U.S. v. Georgia Power Company, the Court held that census statistics for the South which showed that a high school diploma requirement screened out blacks at a higher rate than whites were sufficient to

demonstrate disproportionate impact, and thus shift the burden to defendant to show job relatedness. In Johnson, supra, census statistics from the Texas and Houston area were sufficient to show the disporportionate impact of the challenged diploma requirement. See also Griggs v. Duke Power Co., supra.

By reliance on Gresham v. Chambers, 501 F. 2d 687 (2d Cir., 1974) and United States v. International Union of Elevator Constructors, 538 F. 2d 1012 (3d Cir, 1976) defendants seem to imply, again without directly stating so, that a pattern of discrimination must appear before a prima facie case can be made.[4]

[4] Although there was no specific finding made by the Court, it appears from the testimony that at the time of her termination, plaintiff was the only Black Medical Technologist I in the blood bank. At the time of trial, plaintiff and Mr. Appelwaite, a Med. Tech. III, were the only Blacks working in the blood bank (A277-A278). There are fifteen workers in the blood bank.

But reliance on these cases is misplaced.

In Gresham, the Court, ruling on a motion for preliminary relief, was considering the issue of remedy where a pattern of past discrimination appeared. The Court pointed out that the relevant statistical evidence that had been introduced was insufficient to show discrimination in recruitment inasmuch as there was a higher percentage of black faculty members at Nassau Community College than blacks in the population, and affirmed the denial of preliminary injunction.

United States v. International Union of Elevator Constructors, 538 F 2d 1021 (3rd Cir, 1976) is equally inapposite. There, the Attorney General brought suit pursuant to 42 U.S.C. 200e-6. This statute requires the government to show a pattern of racial discrimination in order to make out a prima facie case. (Interestingly, the finding of a prima facie case based solely on statistics

and the inferences drawn therefrom, was affirmed.) Plaintiff here must make no such statutorily imposed showing.

Defendant's contention that the Court erroneously concluded that a prima facie case had been made because the relief awarded applied only to plaintiff, indicates misunderstanding of the step-by-step analysis in Title VII cases more fully discussed in Point I(a) of this brief. The cases cited by defendants in support of this contention (at p. 15 of their brief) are not at all inconsistent with the lower court's finding here. Two of those cases bear special note.

In Harper v. Trans World Airlines, 525 F 2d 409 (8th Cir, 1975) the plaintiff, like plaintiff here, brought suit as an individual The Court held that plaintiff had not sustained her burden of making out a case of sex discrimination "because she failed to prove by statistics or other probative evidence, that defendants rule adversely affected women",

supra at 412 (emphasis supplied).

Parham v. Southwestern Bell, 433 F 2d 421 (8th Cir, 1970), an individual and class action, is the reverse of the situation presented here. Plaintiff's individual claim of violation was dismissed, but the Court found violation to blacks as a class. The Court stated: "The success or failure of the plaintiff's individual claim in this litigation need not determine the availability of relief to rectify the employer's class discrimination." Supra at 428 (emphasis supplied). Hence, the success of plaintiff's claim here, which was not brought as a class action, need not necessarily determine what relief is available to Blacks as a class.

The cases cited by the defendants with respect to the type of statistics suitable in a Title VII case are totally inapposite. Rich v. Martin Marietta Corp., 522 F 2d 333 (10th Cir, 1975) dealt with the fact that the defendant had introduced irrelevant

statistics. Taylor v. Safeway Stores, Inc., 5.4 , 263 (10th Cir, 1975) held that the statistics introduced failed to show sufficient racial disparity, and indicated in dicta concerning a class action claim that it was appropriate to use statistics of a particular branch of a company where discrimination in that branch was in issue. In Olson v. Philco Ford, 531 CF. 2d 474 (10th Cir, 1976) Olson had claimed she was discriminated against with respect to promotion. She introduced statistics on the work force of the company in general, but failed to introduce statistics with respect to promotion. Jones v. New York City Human Resources Administration, 528 F 2d 696 (2nd Cir, 1976) was an affirmance of a case wherein a civil service examination was found to be discriminatory, a finding that was based on somewhat incomplete statistics.

While it is true that the "facts necessarily will vary in Title VII cases" McDonnell Douglas v. Green, supra at 802, n. 13, plaintiff nonetheless has borne the burden imposed on her as the complaining party, even though she brought suit individually. In Spurlock v. United Airlines, supra, the Court held that plaintiff, who like plaintiff here was suing individually, need only establish that the use of the challenged criteria for hiring had a "discriminatory result" in order to shift the burden to defendants to show job relatedness.

Similarly, in Rich v. Martin Marietta Corp., supra, a suit where class action status had been improperly denied, the Court of Appeals for the 10th Circuit held that the elements of prima facie proof set forth in McDonnell Douglas Corp. v. Green[5], supra

[5] See Point I (a) at p. 13 of this brief supra.

had been too literally applied by the lower court when it ruled that plaintiffs, in their capacity as individuals, had failed to make out a prima facie case. The Court in Rich held that plaintiffs need only demonstrate (1) that they were qualified for the positions to which they sought promotion, (2) that they were among the class of employees who could have been considered, and (3) the discriminatory impact of the criteria that prevented the promotion.

Plaintiff here, in presenting her case to the Court, demonstrated that she was (1) eminently qualified for the position, (2) that not only was she among the pool of employees considered for the job, but she actually performed the job competently for some six years, and (3) that she was terminated and subsequently relegated to a lower paying position solely because she did not possess

a college degree, a requirement which undisputedly has a racially disproportionate impact. The evidence amply supports a finding of a prima facie case, and that the Court so found cannot be said to be "clearly erroneous."

POINT III

DEFENDANTS FAILED TO DISCHARGE THEIR BURDEN OF SHOWING JOB RELATEDNESS OF THE COLLEGE DEGREE REQUIREMENT.

Once a racially disproportionate impact of a job requirement is shown, defendant has the burden of persuading the court that the requirement is justified. Vulcan Society v. Civil Service Commission, supra at 393.

The United States Supreme Court had occasion recently to discuss the nature of the burden imposed on defendants once disproportionate impact has been shown in a Title VII action, as distinguished from a constitutional challenge. In Washington v. Davis, _____U.S. _____, 96 S. Ct. 2040 (1976),

the court stated:

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary in addition, that they be "validated" in terms of job performance in any one of several ways...However this [validation] process proceeds, it involves a more probing judicial review of and less deference to the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact without discriminatory purpose is claimed."
> Id. at 2051 (emphasis added)

The Court in Washington, supra, at 2051 n. 13, noted that there was no single method for validation, and then set forth the three methods mandated by the EEOC guidelines and endorsed by the Court in Albermarle Paper Co. v. Moody, supra. Those three methods --

criteria, content and construct validation -- were considered and discussed by the C rt below, (A302-A303) and it is clear that in the instant case, absolutely no evidence of validation of the degree requirement by any of the professionally or legally acceptable methods was presented by defendants.

No empirical evidence--no criteria validation--was submitted to show that those with degrees perform the job more competently than those without. Vulcan Society v. Civil Service Commission, 360 F. Supp. 1265, 1273 (S.D.N.Y., 1973); 29 C.F.R. § 1607.4 (c). Indeed, the evidence showed that plaintiff, without a degree, was rated among the top three employees at the blood bank (A142).

No evidence was submitted to show in terms of content validation that the aptitude, skills, and training necessary to obtain a degree are equivalent to the skills and

training required in the blood bank or any other laboratory at NCMC. Vulcan, supra at 1274; Linda Swaide, a Med. Tech. I with a degree, testified that the degree did not help her perform or understand her job (A119), and that she acquired the skills necessary for her job as a result of being trained by plaintiff (A108).

Inasmuch as no expert testified as to what general mental and psychological traits a college degree measures, it cannot be said that there was any meaningful construct validation, Vulcan Society, supra, 490 F. 2d 387, 395 (2d Cir., 1973).

In validating a degree requirement, the fact that the requirement is desirable or that it will maintain a high quality of personnel has no relevance. The requirement must be necessary. United States v. Georgia Power Co., supra; Pettway v. American Cast Iron Co., supra; Roman v. Reynolds Metal Co.,

368 F. Supp. 47, 50 (S. D. Texas, 1973).

Any attempt by the defendants to characterize the Cresap, McCormick and Paget survey done by Nassau County in June, 1966, and the interviews and questionnaires employed in connection therewith, as the kind of validation required under the law must be dismissed as being frivolous. Testimony and evidence clearly indicated that the nature of the survey was to analyze salaries paid for various jobs in Nassau County and to re-classify jobs where necessary so as to ensure that employees were paid a fair salary commensurate with the nature of the work they were doing (A201). Rather ironically, plaintiff was first recognized as a Med. Tech. I as a result of the survey on which defendants rely to justify her termination. Further, witness Fontana, a member of the survey team, testified that, to his knowledge, no validation studies were made (A209-A210, A215), and it

appears that the college degree requirement was instituted on the basis of supervisors' recommendations, who themselves relied on unknown criteria. Such is not sufficient to satisfy defendants burden of persuasion, particularly in view of the fact that others as well as plaintiff performed the job satisfactorily without college degrees (A141, A206). See United States v. Jacksonville Terminal Co., 451 F. 2d 418, 456 (5th Cir., 1971); United States v. Georgia Power Co., supra; Pettway v. American Case Iron Pipe Co., supra at 221-222.

It cannot be argued that the court failed to consider evidence that the Med. Tech. I job classification is utilized throughout NCMC, not only because the evidence indicates that employees work in only one laboratory, but also because there was no acceptable validation of the degree requirement for any

laboratory. And that the college degree requirement may be utilized in other jurisdictions, a fact which we do not concede, is of no moment. There is no proof that those jurisdictions validated the requirement before defendants adopted them.

Defendants contend that their burden is lessened because the job involves professional skills and human risk. Spurlock v. United Airlines, supra, and Hodgson v. Greyhound Lines, Inc., 499 F. 2d 859, 862 (7th Cir., 1974) and 29 C.F.R. § 1607.5 (c) (2) (iii) upon which defendants rely in support of this contention are inapposite: these authorities dealt with the lesser burden imposed where hiring an unqualified job applicant is involved. Plaintiff was not being hired for the job: she had performed the job more than competently for some six years. And to assert that she is unqualified is a bootstrap argument: her qualifications remain

unchallenged.

Defendant's reliance here on Kirkland v. New York State Correctional Services, supra is misplaced, inasmuch as this Court found in that case that a civil service system testing requirement, administered pursuant to a statutory merit system was not properly validated.

Finally, defendants contend that as a result of the decision in Washington v. Davis, supra, the law with respect to validation has changed. Nothing set forth in the Washington opinion alters defendant's burden of showing validation of the challenged requirement, even though defendants are public employers.

What Washington v. Davis does permit is that a defendant in a Title VII action may show validation of a particular requirement by proving its positive relationship (in Washington, criteria validation was used) to a job-required skills program such as existed in the Washington

D.C. Police Department.[6] No such formalized training program exists in the instant case, and it cannot be argued that a college degree would significantly improve plaintiff's performance in a skills training program: plaintiff gave the necessary job skills training to employees of defendant who fulfilled the very degree requirement which plaintiff challenges. The analysis permitted by Washington v. Davis is totally inapposite to the instant case.

In Washington, plaintiffs challenged an examination which was a prerequisite for entrance into the Police recruitment training

[6] The job skills training program in Washington, a 17-week intensive course is almost equivalent with the job itself. The District Court noted that "once an officer is recruited, he is not washed out during the subsequent intensive training period at the academy, but rather is given special assistance where needed to assure success" Davis v. Washington, 348 F. Supp. 15 at 16 (D.C., 1972)

program. The challenged examination was sustained because it was shown to be positively related to performance in the skills training program. Here, plaintiff challenges the requirement that she possess a college degree as a prerequisite for permission to take a Civil Service Examination. Assuming arguendo that a Washington analysis applies, defendants would necessarily have the burden of demonstrating a positive relationship between the degree and successful performance on the exam. The record is totally lacking in such evidence, and, in fact, one employee of defendants who possessed not one, but two degrees, took the test once and failed.

The Court below carefully considered the evidence and law both before and after remand. Defendant's total failure to show that, as to plaintiff, the job criteria is valid, entitles plaintiff to relief under Title VII.

POINT IV

THE DISTRICT COURT PROPERLY AWARDED BACK PAY TO THE PLAINTIFF.

It was clearly appropriate to award the plaintiff back pay in the instant case in order to further the objectives of Title VII and to make the plaintiff whole. "The 'make whole' purpose of Title VII is made evident by the legislative history." Albermarle Paper Co. v. Moody, supra; 95 S. Ct. at 2372.

The Court indicated that good intentions were immaterial, and emphasized that the focus of the act was the injury suffered by the complaining party. "Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation. Griggs v. Duke Power Co." Albermarle, supra 95 S. Ct. at 2374 (emphasis in original)

Appellants point to no factors or circumstances which make the award of back pay an abuse of the court's equitable discre-

tion. Instead they maintain that it would not frustrate the purpose of Title VII to deny it. But to deny back pay would frustrate the clearly enunciated 'make whole' purpose noted above. And the general rule is to award back pay unless special circumstances exist requiring denial. Albermarle Paper Co. v. Moody, supra; Pettway v. American Cast Iron Pipe Co., supra, at 253-254.

The consideration is not, as defendants maintain, that the Court must find that had plaintiff been white instead of black she would still have the job, but rather whether plaintiff would have been continued in employment but for the successfully challenged degree requirement. Appellant's reliance on Acha v. Beame, supra, is misguided inasmuch as the issue under discussion there was the problem of proving who in that class action had specifically been the victim of the successfully challenged practice.

Defendant's reliance on Day v. Matthews, 530 F. 2d 1083 (D.C. Cir., 1976) is equally misplaced. In that action, a suit by an individual against HEW, the Court stated that the employer bears the burden of proof to show that the employee's qualifications were such that the employee would not have been selected, even in the absence of discrimination. Day is inapposite inasmuch as in the case at bar, it was shown that but for a degree requirement that operated against blacks in a disparate manner and which was not shown to be job related, the plaintiff would have had the position.

POINT V

THE DISTRICT COURT PROPERLY AWARDED ATTORNEYS FEES TO THE PLAINTIFF.

In Newman v. Piggy Park Enterprises, 390 U.S. 400, 88 S. Ct. 964, the Supreme Court held that attorneys fees should "ordinarily" be awarded in all but "special

circumstances" to plaintiffs successful in obtaining injunctions against discrimination in public accommodations under Title II of the Civil Rights Act of 1964. The Court determined that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs acting as "private attorneys general" were awarded attorneys fees in all but very unusual circumstances.

The Supreme Court stated in Albermarle Paper Co. v. Moody, supra:

> "There is of course an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices...[T]his interest can be vindicated by applying the Piggy Park standard to the attorneys fees provision of Title VII, 42 U.S.C. Section 2000 e-5 (k), See Northcross v. Board of Education, 412 U.S. 427, 428, 93 S. Ct. 2201,

2202, 37 L. Ed. 2d 48."
Albermarle, supra, at p.
2370.

The Court below found that plaintiff had been victim of discrimination, and awarded her injunctive relief. That she was not awarded preliminary relief is immaterial.

It is respectfully submitted that in the case at bar there are no special circumstances presented that would bar an award of attorneys fees.

CONCLUSION

For the reasons above stated, the order and judgment appealed from should be affirmed.

Respectfully submitted,

SUSAN KLUEWER
Community Legal
Assistance Corporation
McEVILY & KLUEWER
73 Main Street
Hempstead, New York 11550
(516) 489-4226/7

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

MARGARET TOWNSEND,

Plaintiff

against

NASSAU COUNTY MEDICAL CENTER, et al.

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NASSAU *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 11 Harrison Avenue, Hempstead, New York 11550

That on January 14, *1977 deponent served the annexed* Brief for Plaintiff-Appellee

on County Attorney, Nassau County

attorney(s) for County Defendants

in this action at 1 West Street, Mineola, New York 11501

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office ~~x~~official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me January 14, 1977

GERALDINE MOORE
NOTARY PUBLIC, State of New York
No. 2738000
Qualified in Nassau County
Commission Expires March 30, 19..... 77

Geraldine Moore

Tanya McDougald

The name signed must be printed beneath

TANYA McDOUGALD